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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-70

LEWIS H. GOLDFARB and RUTH S. GOLDFARB, individually and as Representatives of the Class of Reston, Virginia Homeowners,

Petitioners,

v.

VIRGINIA STATE BAR and FAIRFAX COUNTY BAR ASSOCIATION,

Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

This reply brief is submitted in response to the briefs submitted by the two respondents as well as the six briefs *amicus* submitted in support of their position. In addition to supplementing the arguments made in petitioners' principal brief ("Pet. Br."), this reply will address the issues of the effect of the Eleventh Amendment, raised by respondent Virginia State Bar, and of prospectivity, raised by respondent Fairfax County Bar Association, neither

of which were addressed in our original brief. It remains the view of petitioners that neither of these issues should now be considered by this Court but should be resolved in the first instance by the court of appeals which, because of its other rulings, did not pass on these questions. See *United States v. ITT Continental Baking Co.*, ____ U.S. ____, 43 U.S.L.W. 4266, 4267 n. 2 (decided February 19, 1975).

I. RESPONDENTS' MINIMUM FEE SCHEDULE SYSTEM CONSTITUTES A PER SE VIOLATION OF THE SHERMAN ACT.

A. The Activities of Respondents Plainly Constitute Price-Fixing.

Respondent Fairfax has contended (Br. 47-52) that the minimum fee schedule system involved here does not constitute price-fixing because the schedule was "merely advisory." (Br. 50, 52) That view, of course, conveniently overlooks (a) that under Opinions issued by the State Bar, an attorney who habitually charged below the minimum schedule could be disciplined for that reason alone (A. 45-48),[1] (b) that the record demonstrated numerous instances of attorneys who believed that they were ethically required to, and in fact did adhere to, the minimum fee schedule (Pet. Br. 4-5), and (c) that the district court found as a fact that the Goldfarbs had been injured by the operation of the minimum fee schedule system (App. A, p. 4). It is simply not open to respondents to argue in this Court that the facts found by the district court are unsupported by the record.

[1] References preceded by "A" are to the single printed appendix. References to the appendices accompanying the petition will designate the particular appendix and the page in it, (App. ___ p. ___).

Moreover, the law is clear that there need not be actual adherence in order for there to be price-fixing in violation of the Sherman Act. *Plymouth Dealers Ass'n of Northern California v. United States*, 279 F.2d 128 (9th Cir. 1960). Furthermore, as this Court observed in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222 (1940), it is irrelevant "that the prices paid by the combination were not fixed in the sense that they were uniform and inflexible . . ."; price-fixing exists if there is a combination "with the effect of raising, depressing, fixing, pegging or stabilizing the price of a commodity in interstate or foreign commerce . . . ." *Id.* at 223. Thus, any combination "which tampers with price structure" is a *per se* violation of the Sherman Act. *Id.* at 221.

This Court has recently declared that any activity which "tends toward price uniformity" constitutes a *per se* violation of the Sherman Act. *United States v. Container Corp. of America*, 393 U.S. 333, 337 (1969). "Price is too critical, too sensitive a control to allow it to be used even in an informal manner to restrain competition." *Id.* at 338. Similarly, in *United States v. National Ass'n of Real Estate Bds.*, 339 U.S. 485 (1950), the use of a minimum fee schedule similar to the one at issue here was held to constitute a *per se* violation even though there was no possibility of disciplinary proceedings against those who did not adhere to it. Based on these authorities, we submit that there is no question that respondents' activities constituted price-fixing in violation of the Sherman Act.

B. The Obligation of the Bar to Protect the Public through Self-Regulation Does Not Permit the Bar to Avoid the Effect of *Per Se* Rules Under the Sherman Act.

Contrary to the assertion of respondent Fairfax (Br. 26-32), the "weight of judicial authority" does not support a learned profession exemption (See Pet. Br. 34-43). Moreover, it is not correct, as the brief of the *amicus* American Bar Association (ABA) asserts, that "all antitrust decisions in any way concerned with the professions have carefully considered the particular characteristics of the profession involved" (ABA Br. 3), nor is it correct that the relevant decisions contain "ample support for the proposition that an exclusion, or some other mechanism, *must exist* to harmonize necessary professional regulation with antitrust principles developed in the context of ordinary trade or commerce." (ABA Br. 7, emphasis added). In fact, this Court in *American Medical Ass'n v. United States,* 317 U.S. 519, 528 (1943) ("*AMA*"), held that the occupations of the defendants were "immaterial if the purpose and effect of their conspiracy was [the] obstruction and restraint of the business of Group Health." In ruling that defendants in *AMA* violated the Sherman Act, this Court evidenced not the slightest concern that the anticompetitive conduct was rooted in medical ethics. Just as the activities in *AMA* were purportedly based upon ethical considerations,[2] the claim of ethics is raised here as a defense to the price-fixing charge and should be rejected by this Court under the authority of *AMA*.

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[2] See *United States v. American Medical Ass'n,* 110 F.2d 703, 706, 711-712 (D.C. Cir. 1940).

Petitioners share the concern of the *amicus* ABA for the welfare of the members of the public who are the consumers of legal services, but firmly believe that their interest as consumers will be advanced by applying the antitrust laws to minimum fee schedules. In our view there is no basis for concluding that minimum fee schedules are intended to, or have the effect of aiding the public in dealing with the Bar.[3] Indeed, the plainly economic origins of minimum fee schedules in Virginia (Pet. Br. 7-8 and n. 5; 42-43 and n. 32) are convincing evidence that, like price-fixing in other fields, the restraints operate here for the principal benefit of the lawyers who use them. The point is further emphasized by the State Bar of Texas' quotation of EC 2-16 of the Code of Professional Responsibility in the conclusion to its *amicus* brief supporting the decision below:

> The legal profession cannot remain a viable force in fulfilling its role in our society unless its members receive adequate compensation for services rendered and reasonable fees should be charged in appropriate cases to clients able to pay them. (Br. 29).

While many other ethical restrictions to which lawyers are subject do in fact serve as significant protections for the public, minimum fee schedules plainly do not, and this Court need not be concerned that the elimination of fee schedules will have any adverse impact on the consumers of legal services.

[3] In evaluating the claim that fee schedules protect the public, we note that as to the services involved in this case (title examinations in Virginia) lenders do not rely on the lawyer's opinion as to the state of the title but require title insurance in virtually every case (App. A, p. 4). Therefore, contrary to the assertion of the Fairfax Bar (Br. 34), the true source of the public's protection is the title company, not the lawyer.

The apparent fear of the ABA is that ethical considerations unrelated to minimum fee schedules may be destroyed by too expansive a sweep of the antitrust laws which would undermine the principle of self regulation and thereby cause serious harm to the public. Petitioners too are concerned about the problem of delivering quality legal services and with insuring that clients receive ethical treatment from the members of the Bar. However, we believe that the proposal of the ABA for reconciling self-regulation and the antitrust laws (Br. 13) is no solution to the problem. Under that proposal, any conduct "in furtherance of legitimate objectives of professional regulation" would be exempt from antitrust scrutiny. Quite apart from the fact that neither in *AMA* or any other decision has this Court upheld an antitrust exemption based on the legitimacy of the objectives of the activities,[4] the "in furtherance of" language and the phrase "legitimate objectives of professional regulation" are so broad that they appear to exclude every significant restraint from the reach of the Sherman Act. This conclusion is buttressed by the fact that the ABA takes no position with respect to whether minimum fee schedules violate the Sherman Act under its own test, and its brief does not even urge this Court to decide this case in a particular way although all the evidence supporting fee schedules is in the record. The fact that the ABA's "solution" produces no resolution of legality even with respect to the most pernicious of antitrust violations — price-fixing through minimum fee schedules — strongly suggests that it is not a test or a resolution, but a total exemption from the antitrust laws.

[4] *In United States v. Topco Associates Inc.*, 405 U.S. 596, 610 (1972) this Court specifically rejected an argument that "naked restraints of trade are to be tolerated because they are well-intended . . . ."

Fairfax and the ABA nonetheless contend that to apply the *per se* rule even in this situation would destroy the principle of self-regulation, a principle which has never been upheld in an antitrust context, as evidenced by the decision in *AMA*. For this proposition Fairfax relies on *Silver v. New York Stock Exchange,* 373 U.S. 341, 348-349 (1963), where this Court indicated that antitrust laws may be modified where the conduct is supported by a "justification derived from the policy of another statute or otherwise." There is, of course, no statute which specifically authorizes the practices at issue here, and there is no case of this or any other court upholding an exemption based on the "or otherwise" language.

Another aspect of the *Silver* exemption is that incursions into the antitrust laws are permitted ". . . only if necessary to make the Securities Exchange Act work and even then only to the minimum extent necessary." *Id.* at 357. To this end, Fairfax argues that the fee schedules and the State Bar Reports are "essential components of Virginia's policy of ethical regulation of the legal profession" (Br. 5), that they are aspects of "the necessities of professional self-regulation" (Br. 26), and that the fee schedules can be justified by their "importance . . . to the profession's self-regulation" (Br. 28-29). But its own action on September 16, 1974, in permanently rescinding its own fee schedule wholly undermines those claims. In addition, the ABA's Board of Governors has recommended that state and local bar associations that have not already done so "give serious consideration to withdrawal or cancellation of all schedules of fees, whether or not designated as 'minimum' or 'suggested' fee schedules." American Bar News, Vol. 19, No. 5, p. 4 (June 1974). A number of jurisdictions have never had minimum fee schedules,

and several that had them have abandoned them since the initial decision in this case. *Id.* Furthermore, the Alexandria and the Arlington County Bars withdrew their minimum fee schedules in order to settle this case, and there is no indication that there has been any resultant flood of unethical conduct in those localities. Finally, other professionals, such as doctors and dentists, manage to maintain their ethical standards without any devices similar to minimum fee schedules. In short, even if necessity were sufficient to create an exemption, minimum fee schedules would not qualify.

If exceptions to the *per se* rule are needed for the learned professions, they should be created either by a federal statutory exemption, as Congress has done for other industries (Pet. Br. 31-34) or should arise only by strict compliance with the requirements of *Parker v. Brown*, 317 U.S. 341 (1943). At one point Fairfax appears to recognize the inter-relation between Virginia's regulation of the practice of law and a professional exemption (Br. 33). Nonetheless, it never connects its contention that the "practice of law is comprehensively supervised and regulated" with the defense in *Parker*, which is rooted in meaningful regulation by the State as an alternative to the antitrust laws. Instead it contends that self-regulation is a sufficient justification to apply the rule of reason to the learned professions where otherwise *per se* violations are involved, regardless of whether the requirements of *Parker* are met.[5] In like manner the ABA argues that

[5] Similarly, it suggests that "if the doctrine in *Parker v. Brown* does not apply here, the rule of reason is needed to provide a smooth interface between state regulation and antitrust enforcement." (Br. 56).

our position "ignores both the history and realities of professional self regulation" (Br. 16), but its own position assumes that this Court has previously approved such self-regulation in the context of the antitrust laws, when in fact that is not the case. Moreover, it fails to take into account the limited scope given to self-regulation by this Court in *Silver* and simply proceeds from the assumption that self-regulation by the professions is fully consistent with the Sherman Act.

One sentence in the conclusion to the ABA's brief points up the error of the claim based on self-regulation: "The Sherman Act was not intended and should not be interpreted to nullify such a political choice made by state governments." (Br. 16-17). If by "political choice", the ABA is referring to a legislative decision to permit the Virginia Bar to issue fee schedules as an alternative to free competition, then plainly there is no statute here similar to that in *Parker v. Brown.* It is a legislative judgment which is necessary, for as this Court stated in *United States v. Topco Associates, Inc.*, 405 U.S. 596, 612 (1972), in declining to create a judicial exemption from a *per se* rule, "the judgment of the elected representatives of the people is required." That is precisely what happened in *Parker*, and that is precisely what has not taken place in this case and why the claim of self-regulation cannot stand.

* * *

The professional status of Sherman Act defendants is legally irrelevant where they are engaged in price-fixing, as respondents were here. The history and origin of minimum fee schedules in Virginia demonstrates that their inspiration is economic rather than the protection of the

public. As the *amicus* brief of the Texas Bar so nicely illustrates, minimum fee schedules are intended to produce "adequate compensation" for lawyers, a justification which is virtually identical to the claimed attempts to prevent "ruinous competition, financial disaster, evils of price cutting and the like" which this Court rejected as a defense when raised by the oil companies in *United States v. Socony-Vacuum Oil Co., supra,* 310 U.S. at 221. This Court has consistently rejected such attempts to interfere with the pricing mechanism in the past, and it should continue to do so in this case. If there is a need for a "learned profession" exemption from the antitrust laws, the case should be addressed to, and decided by, the Congress or the various State legislatures.

II. PETITIONERS ESTABLISHED THE REQUISITE RELATION WITH INTERSTATE COMMERCE TO SATISFY THE REQUIREMENTS OF THE SHERMAN ACT.

In its contention that petitioners have failed to meet the commerce requirements of the Sherman Act, Fairfax takes the position that there must be actual proof that the restraints imposed by the minimum fee schedule system adversely affected the interstate purchasing and financing of homes in Northern Virginia. It does not dispute the fact that there are substantial interstate aspects in the markets for purchasing and financing homes in Northern Virginia and that the restraints at issue are applied to an integral part of those transactions — the title examination which is required by virtually all lenders in Northern Virginia. But, according to Fairfax, petitioners are obligated to show more than this relation to interstate commerce to meet the test of the Sherman Act, and because they have not proven, for example, that the interstate

mortgage money market has been impeded by the operation of minimum fee schedules, petitioners can not prevail. We believe that the test proposed by Fairfax is unsupported by any decision of this Court and that to adopt it would result in a sharp curtailment of the jurisdiction of the of the Sherman Act.[6]

At the outset it is important to clarify our position. We have not contended, as Fairfax suggests, that "since a per se antitrust offense has been alleged in this case, a substantial effect upon interstate commerce should automatically be presumed" (Br. 17). We have argued only that, under *Burke v. Ford,* 389 U.S. 320 (1967), once a *per se* offense is shown, and that offense is shown to be directly connected to transactions with substantial interstate aspects to them, then the effects on those interstate aspects may be presumed and need not be proven. Thus, in *Burke,* plaintiffs established only that defendants had committed a *per se* offense by dividing wholesale liquor markets by territories and by brands, and that all the liquor for those

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[6] This Court's recent ruling in *Gulf Oil Corp. v. Copp Paving Co.,* ___ U.S. ___, 43 U.S.L.W. 4059 (decided December 17, 1974) was based on the "in commerce" provisions of the Robinson-Patman and Clayton Acts, and hence is not relevant to determinations under the "substantial effect on interstate commerce" test under the Sherman Act. See 43 U.S.L.W. at 4062, Slip. Opin. p. 8. This Court's reference in *Gulf Oil* to the need for a "particularized judicial determination" under the Sherman Act, 43 U.S.L.W. at 4064, Slip Opin. p. 12, requires no more than that interstate aspects of the case before the court be established rather than presumed, a requirement which petitioners plainly met through their evidence as to the interstate movement of homebuyers, mortgage money, and guarantees of loans.

markets had come from out-of-state. This Court held that the evidence was sufficient to meet the commerce requirements of the Sherman Act, observing that the "state-wide wholesalers' market division inevitably affected interstate commerce." 389 U.S. at 322.

Just as no further proof was required in *Burke*, petitioners here are required to establish no more than they have proven at trial. Given the extent of this restraint, which affected virtually every purchase of a home in Northern Virginia for the ten years that the fee schedules were in effect, it is difficult to imagine what "proof" of the kind Fairfax demands could ever be produced in this case, or for that matter could have been offered in *Burke*. Indeed, there may be no way to "prove" that a pervasive conspiracy involving a multitude of relatively small transactions like those at issue here has, even in the aggregate, a substantial effect on interstate commerce if proof of the kind suggested by respondent is required. On the other hand, the approach of this Court in *Burke*, utilizing a presumption of substantial effects where a *per se* violation restrains commerce with significant interstate components, avoids these essentially insoluble problems of proof. Furthermore, it insures that *per se* restraints operating on the local level, against what are parts of larger interstate transactions, will not escape Sherman Act liability.

As we demonstrated in our initial brief (pp. 48-53), the reach of the Sherman Act is exceedingly broad and is intended to cover every restraint that Congress could constitutionally prohibit through the Commerce Clause. There can be little doubt that ~~Congress~~ could constitutionally bring within the Sherman Act the restraints involved here which are integrally related to millions of dollars in interstate transactions each year. Therefore, petitioners have

established all that is necessary to sustain jurisdiction under the Sherman Act, and, accordingly, because Fairfax has sought to impose a far higher standard of proof regarding interstate commerce than the authorities require, its position cannot be sustained.

III. THE DOCTRINE OF *PARKER V. BROWN* DOES NOT IMMUNIZE THE CONDUCT OF EITHER RESPONDENT.

In its argument with respect to *Parker v. Brown, supra,* the State Bar treats the question as though the Bar were itself an agency of the Commonwealth of Virginia for all purposes, much as it does in its argument on the Eleventh Amendment. (See Point IV, *infra*). But the State Bar is very different from the typical state agency, principally because its sole responsibility is the regulation of the conduct of its members, all of whom are attorneys. In addition, the statute which sets forth the Bar's powers (Va. Code §54-49), does not make the State Bar a state agency but merely allows it "to *act* as an administrative agency" and then limits its functions as a state agency to enforcing rules and regulations issued by the Virginia Supreme Court.

There is no mention any place in section 54-49 of any authority to issue and promulgate the fee schedules or fee reports involved here, nor is there any authority to police the fee schedules issued by the local bar associations. We are simply at a loss to understand the basis of the claim of the State Bar that it "clearly has the power to regulate the legal fees to be charged through the rendering of ethical opinions, a duty imposed by statute." (Br. 11). It is true, as the State Bar points out (Br. 14-15), that section 54-48 authorizes the Supreme Court of Virginia to

adopt a code of ethics and that such authority has been delegated to the State Bar, but we are unable to see the basis upon which the State Bar concludes that "the legislature of Virginia has therefore, 'directed' the activities forming the basis for this complaint." (Br. 15). Indeed, section 54-51 of the Code of Virginia specifically prohibits the Virginia Supreme Court from adopting or promulgating "rules or regulations prescribing a code of ethics governing the professional conduct of attorneys at law, which shall be inconsistent with any statute; . . ." Therefore, the statutory authority under the Virginia Code is the same type of general authority held to be insufficient in *United States v. Oregon State Bar*, 385 F.Supp. 507 (D. Ore. 1974), to create a *Parker* exemption.

Although the majority in the court of appeals ruled that the State Bar was exempt under *Parker* because the Virginia Supreme Court had actively supervised its issuance of the fee reports and ethical opinions (App. B, p. 11), the State Bar makes no attempt to defend its activities on that basis, nor does it claim, as the district judge and the concurring judge in the court of appeals found, that it played only a "minor role" in these matters. (App. B, p. 21). Its *Parker* claim rests entirely on its assertion that as a state agency it cannot be liable for antitrust violations, a position, we submit, that is not supported either by *Parker* or any decision of this or any other court.

The position of respondent Fairfax on this issue is that "the Commonwealth has placed its stamp of approval on the use of advisory fee schedules for the legitimate purpose of complying with state-adopted Canons of Ethics and the Code of Professional Responsibility." (Br. 6). In fact, there is not the slightest indication that anyone on the

Supreme Court of Virginia or any other State Agency ever looked at any of the fee schedules promulgated by any of the local bar associations, including Fairfax, and each of the judges in the lower courts who has examined this question has found the *Parker-Brown* claim of Fairfax to be wanting. This is not a situation in which "Fairfax and its members are now caught between antitrust sanctions urged by petitioners on the one hand and state regulation on the other" (Br. 10-11), nor are they faced with "conflicting state regulation" (Br. 43). Neither is it correct that the fee schedules are "an integral part of state regulatory requirements" (Br. 42), nor that the State has "in effect necessitated local advisory fee schedules." (Br. 44). Whatever the force that argument might have had has been obliterated by Fairfax's voluntary abandonment of those "requirements" imposed by the State. The district court was clearly correct when it stated that the Fairfax Bar "has adopted a minimum fee schedule although it was under no compulsion to do so." (App. A, p. 5). Having made that decision, and having failed to obtain the requisite approval by an independent agency of the Commonwealth of Virginia, it is in no position to claim a defense based on *Parker v. Brown*.

IV. THE STATE BAR OF VIRGINIA IS NOT IMMUNE FROM LIABILITY FOR DAMAGES ON ACCOUNT OF THE ELEVENTH AMENDMENT

The State Bar claims that it is an agency of the State for Eleventh Amendment purposes, and hence the damage claim of petitioners against it must be dismissed.[7] Merely

[7] Nothing in the Eleventh Amendment operates to preclude actions in the state courts, subject to any state court sovereign immunity defense. However, the law is clear that the state courts have no (continued)

because the State Bar is an agency of the State for some purposes, does not mean that the nexus between the State Bar and the State are sufficiently close to entitle the State Bar to protection under the Eleventh Amendment. As the court noted in *American Hospital Supply Corp. v. York County Inst. Dist.*, 123 F.Supp. 187, 190 (M.D. Pa. 1954), ". . . to say that the defendant is a State agency performing a governmental function or that it is a State instrumentality is not the equivalent of saying that it is entitled to the immunity of the Eleventh Amendment." See also *Ex Parte Young*, 209 U.S. 123, 155 (1909): ". . . the state is not a party to a suit [for Eleventh Amendment purposes] simply because the state railroad commission is such a party."[8]

Whether a state agency is entitled to the Eleventh Amendment immunity from damages that the State would enjoy will depend largely on whether the money to pay the judgment will come from the State or from an entity other than the State. See *Gordenstein v. University of Delaware*, 381 F.Supp. 718, 721 (D.Del. 1974); *Krisel v. Duran*, 258 F.Supp. 845, 849 (S.D.N.Y. 1966), *aff'd*, 386 F.2d 179 (2d Cir. 1967), *cert. denied*, 390 U.S. 1042 (1968). Thus, in *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 464 (1945), this Court stated:

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[7] (continued)
jurisdiction over actions under the Sherman or Clayton Acts, see *Freeman v. Bee Machine Co.*, 319 U.S. 448, 451 n. 6 (1943), and thus petitioners will be without a forum to recover their damages if the Eleventh Amendment applies in this case.

[8] While a state may waive its Eleventh Amendment immunity, see, *e.g.*, *Parden v. Terminal Ry. Co.*, 377 U.S. 184 (1964), petitioners make no claim that there has been such a waiver in this case.

> . . . when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though the individual officials are nominal defendants.

This Court recently reaffirmed that view in *Edelman v. Jordan*, 415 U.S. 651, 663 (1974), a case in which welfare recipients sought retroactive payments from a state agency:

> . . . a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment.

The question in this case then is whether the funds which will pay any judgment will come from the "general revenues" of the State, *id.* at 665. Here, the State Bar has not alleged, nor is there statutory authority to support such an allegation, that the State itself would be liable for any judgment in this case. Rather, it appears that the judgment would be paid out of the special fund maintained for the operation of the State Bar — a fund whose monies are derived solely from dues paid by members of the Virginia State Bar (Va. Code §54-50), and are expended solely for the operation of the State Bar (Va. Code §54-52). The State Bar's financial independence from the general revenues of the State deprives it of any claim of Eleventh Amendment immunity from damages.

> This action will not and cannot in any way affect the Treasury of the State . . . That is the test of whether or not a suit is against the state. *Harrison Construction Co. v. Ohio Turnpike Comm.*, 272 F.2d 337, 340 (6th Cir. 1959).

In a number of cases involving agencies which had relationships to the State Treasury similar to that of the State Bar here, courts have held that because the agency is financially self-sustaining, and the State is insulated from liability for the agency's debts, the agency is not an "alter ego" of the State, and therefore suits against it are not barred by the Eleventh Amendment. See *Harrison Construction Co. v. Ohio Turnpike Comm., supra; Bowen v. Hackett,* Civ. Action No. 5038 (D. R.I. Jan. 16, 1975); *Raymond International Inc. v. M/T Dalzelleagle,* 336 F.Supp. 679 (S.D.N.Y. 1971); *S.J. Groves & Sons v. New Jersey Turnpike Authority,* 268 F.Supp. 568 (D. N.J. 1967); and *Zeidner v. Wulforst,* 197 F.Supp. 23 (E.D.N.Y. 1961).

A situation closely analogous to the case at bar was presented in *Bowen v. Hackett, supra.* There, plaintiffs sought to recover retroactive unemployment benefits from the State Department of Employment Security. The court concluded that any damages would come entirely from a special fund, which was supported by a limited class of persons (employees and employers), and hence the State's general revenues were not subject to reduction by any judgment which might be rendered. Accordingly, it ruled that the Eleventh Amendment did not constitute a bar to the relief plaintiffs sought, notwithstanding the fact that, as in this case, the State Treasurer was the custodian of the funds. Therefore, since the State Bar is financially independent of Virginia's general revenues and any judgment against it could be satisfied only from a special fund consisting of dues paid by its members, the Eleventh Amendment does not preclude petitioners' claim for damages against the State Bar.

V. THERE IS NO BASIS FOR RELIEVING RESPONDENTS FROM THEIR LIABILITY FOR DAMAGES BY MAKING THE DECISION PROSPECTIVE ONLY.

Respondent Fairfax contends that even if petitioners are able to establish that respondents' operation of the minimum fee schedule system violated the Sherman Act and caused petitioners actual monetary losses, relief should be limited to an injunction and declaratory judgment (Br. 59-63). In support of this position, it quotes broad language from *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), and *Lemon v. Kurtzman*, 411 U.S. 192 (1973), but fails to discuss the factual settings in which those cases arose and neglects to mention two other decisions of this Court dealing with the issue of prospectivity under the antitrust laws, *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), and *Simpson v. Union Oil Co.*, 396 U.S. 13 (1969). A careful reading of these cases demonstrates that retroactive application of a new rule of law is denied in civil cases only in circumstances far different from the present case.

In *Chevron, supra*, the plaintiff had sustained an injury while working on an offshore oil rig, and it was not until long after the accident that he discovered the severity of the injury. Under the law of the Circuit at the time he filed suit, the timeliness of his action was not determined by a statute of limitations, but only by laches, under which the plaintiff concededly would not have been barred. Before the case came to trial, this Court rendered a decision directly contrary to a long line of cases in the Circuit in which the action was pending, and ruled that local statutes of limitations did apply in this type of case. The question in *Chevron*, then, was whether the statute of limitations ruling should be made retroactive, with the result

that an injured worker would be totally deprived of his remedy. In declining to bar the plaintiff in *Chevron,* this Court used the language relied on by Fairfax but did so in order to permit the injured party to have his day in court and not, as Fairfax would have it here, to permit wrongdoers to avoid making petitioners whole.

In *Lemon v. Kurtzman, supra,* an injunction had been obtained preventing the State of Pennsylvania from paying state funds to nonpublic, sectarian schools on the grounds that the Pennsylvania statute violated the First Amendment. See *Lemon v. Kurtzman,* 403 U.S. 602 (1971). Plaintiffs then sought to prevent the State from reimbursing schools for the services provided prior to this Court's decision holding the statute unconstitutional, but this Court declined to grant that additional relief. In so holding, it relied on the fact that it would be inequitable to deny the schools reimbursement for money that had been spent in reliance on a clear legislative program, particularly since plaintiffs had abandoned their attempt to obtain a suspension of payments during the litigation and did not seek to prohibit further reimbursements until after this Court ruled in their favor on the merits. It also observed that in making the reimbursement there would only be minimal state involvement in church affairs, and therefore to allow the payment to the schools would not further undermine the constitutional interests at stake to a significant degree.

The trial court in this case twice rejected Fairfax's application for immunity from petitioners' damage claims (A. 3, 4). The correctness of that determination is amply supported by two antitrust decisions of this Court on the issue of prospectivity which are conspicuously absent from Fairfax's brief, *Hanover Shoe Inc. v. United Shoe*

Machinery Corp., *supra*, and *Simpson v. Union Oil*, *supra*. In *Hanover Shoe*, this Court set the framework within which this claim of prospectivity should be decided:

> There is, of course, no reason to confront this theory unless we have before us a situation in which there was *a clearly declared judicial doctrine* upon which United relied and under which its conduct was lawful, a doctrine which was *overruled* in favor of a new rule according to which conduct performed in reliance upon the old rule would have been unlawful. 392 U.S. at 496 (emphasis added).

By way of emphasis this Court added that the doctrine of retroactivity should only be applied where the Court was "adopting a radically new interpretation of the Sherman Act," *id.* at 497, or where there "was such an abrupt and fundamental shift in doctrine as to constitute an entirely new rule which in effect replaced an old one." *Id.* at 498.

These factors are simply not present in this case. No one contends that there is a prior decision of this Court holding that fee schedules are lawful under the Sherman Act. In fact, both the holding in *AMA* that the activities of doctors are subject to the Sherman Act, and Mr. Justice Jackson's statement in dissent in *United States v. National Ass'n of Real Estate Bds.*, *supra*, 339 U.S. at 496[9] were ample notice that the use of minimum fee schedules at least raised serious antitrust questions.

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9 "I am not persuaded that fixing uniform fees for the broker's labor is more offensive to the antitrust laws than fixing uniform fees for the labor of a lawyer, a doctor, a carpenter, or a plumber."

Although the Court has occasionally denied retroactive effect to its rulings, we are aware of no action seeking the recovery of monetary damages where relief was denied to the party who brought the case in which the new rule was announced. Thus, in *Simpson v. Union Oil, supra,* this Court reached a result directly contrary to Fairfax's position, observing that:

> The question we reserved [whether recovery should be retroactive] was not an invitation to deny the fruits of successful litigation to this petitioner. . . Formulation of a rule of law in an Article III case or controversy which is prospective as to the parties involved in the litigation would be most unusual. . . . 396 U.S. at 14.

Similarly, even in the criminal law where a new rule may not be applied retroactively, the defendant who raised the issue is always granted relief since to do otherwise would remove the incentive for challenging illegal or unconstitutional actions and might raise questions under Article III. See *Stovall v. Denno,* 388 U.S. 293, 301 (1967).

Fairfax contends that retroactive relief in this case would be inequitable because lawyers all over the country might be subject to damage claims for their use of fee schedules. That argument, however, provides no support for the position that these petitioners should be denied the right to recover their own damages. Were this Court to find that retroactive application of relief to others would be inequitable, this Court has demonstrated that it can adequately fashion remedies to avoid such inequity. See *Linkletter v. Walker,* 381 U.S. 618 (1965). And if, as Fairfax suggests, the fee schedules were only used to determine a reasonable fee (Br. 50-52), there will be no damages to petitioners,

let alone the "ruinous" liability that Fairfax alleges will ensue (Br. 63).

Finally, if this Court should decide not to reject the claim of prospectivity as a matter of law as we urge it to do, petitioners are at least entitled to have the proceedings reopened so that they may demonstrate that there was no reliance by Fairfax of the kind that meets the tests enunciated in *Chevron* and *Lemon, supra.* In this respect it should be noted that this defense was never raised in Fairfax's answer, or by motion, or in any of its proposed findings of fact or conclusions of law submitted to the trial court, but was first advanced after the liability issue was determined against it.[10] Thus, petitioners were effectively denied the opportunity to offer evidence on this issue at trial since they were never advised that it was an issue in the case. While petitioners did not object to the introduction of correspondence with the Department of Justice on the issue of liability, we would strongly oppose its admission on the question of prospectivity, especially since the proferred exchange of letters is with the Arlington, not the Fairfax, Bar. Moreover, there is no showing that Fairfax was aware of the existence of the correspondence prior to this suit, let alone that it reasonably relied on it in issuing its fee schedule. There is, we submit, no proper basis upon which Fairfax's claim that relief should be prospective only can be decided in its favor at this time.

[10] In our view, the failure to raise this issue until after trial, and the absence of any excuse for not doing so previously, acts as a waiver of Fairfax's right to assert it. See *Jordan v. Weaver*, 472 F.2d 985, 995 (7th Cir. 1973), *reversed on other issues sub nom, Edelman v. Jordan, supra.* Unlike the Eleventh Amendment which this Court has held need not even be raised at all in the trial court, *Edelman v. Jordan, supra,* 415 U.S. at 677-678, a claim of prospectivity is not jurisdictional and hence must be raised in a timely manner like any other affirmative defense.

CONCLUSION

For the foregoing reasons and those set forth in our brief of December 20, 1974, petitioners submit that the decision below should be reversed and the case remanded for further proceedings with respect to petitioners' damage claims.

Respectfully submitted,

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